Supreme Court, U.S.
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No.

in the

Supreme Court

of the

United States

EDUARDO V. SAENZ,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I.

Does the Petitioner's sentence, based upon judicial findings regarding the amount of drugs involved in the offense and aggravating role, violate *United States v. Booker*?

II.

Was it error to exclude expert testimony on the issue of voice spectrographic analysis?

III.

Did the Government engage in misconduct by intimidating a proposed defense witness, such that due process was violated?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, Eduardo Saenz, respectfully prays that a writ of certiorari issue to review the judgement of the United

States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on December 30, 2004. A Petition for Rehearing En Banc was denied on March 2, 2005.

OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is unreported (Case No. 04-11678) That determination is attached hereto in Appendix 2. The denial of a Petition for Rehearing En Banc is attached as Appendix 1.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on December 30, 2004. A petition for rehearing en banc was denied on March 2, 2005. This petition for a writ of certiorari has been filed and docketed within the time prescribed. The jurisdiction of this Court is invoked under 28 U.S.C. §1291 and Supreme Court Rule 12.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury of the State and district wherein the crime shall have been committed*, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; *that have compulsory process for obtaining witnesses in his favor*, and *to* have the Assistance of Counsel for his defence.

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in case arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The Petitioner herein, Eduardo Saenz, was originally charged in a 3 count indictment charging him with conspiracy to possess and distribute five kilograms of cocaine, in violation of 21 U.S.C. § 846, and two counts of possession with the intent to distribute five kilogram or more of cocaine, in violation of 21 U.S.C. § 841(b)(1)(A).

The Petitioner plead not guilty, and proceeded to trial. The testimony proffered by the Government indicated that the Petitioner, allegedly acting under the alias "El Gordo", supplied co-defendant Perez with 25 kilograms of cocaine on August 15, 2002. A Miami attorney, Joaquin Fernandez, allegedly acted as a go-between for the conspirators, introducing Perez and the Petitioner, and serving as a point of contact. During trial, the Government introduced tapes which purportedly contained the Petitioner's voice.

The defense sought to challenge the Government's use of the tapes allegedly containing the Petitioner's voice. To that end, they sought to introduce the testimony of Steve Cain, a member of the American Board of Recorded Evidence. Mr. Cain proffered testimony regarding voice spectrography, and the failure of the Government to use it in the case in an attempt to identify the Petitioner. The Government presented the testimony of Dr. Nakasone, an FBI electronics engineer, who testified that the technique was unreliable. The court denied the admission of the testimony.

The defense sought to call as a witness Joaquin Fernandez to dispute the validity of Perez's testimony and the Government's theory of prosecution. However, prior to trial, the Government (who had previously indicated that Fernandez was not a subject of prosecution) subpoenaed Fernandez as a Government witness. Further, they informed him that he was now being considered a "subject" of investigation, and

provided him with Miranda warnings. Based upon these facts, Fernandez indicated his intention to invoke his Fifth Amendment privilege.

The Petitioner was ultimately convicted of all counts. On March 29, 2004, the court sentenced the petitioner to 188 months, the low end of the Guideline range, after determining the amount of cocaine involved in the offense, that the Petitioner was an organizer/leader, and that the Petitioner had not accepted responsibility.

The Petitioner subsequently appealed his conviction and sentence to the Eleventh Circuit. In an unpublished opinion, the Eleventh Circuit denied the appeal in toto. The court found, as to the exclusion of Steve Cain, that "voice spectrographic technique is not widely accepted by the scientific community and is thus not admissible under Daubert." (Appendix 2, p.15) As to the chilling effect brought on by Fernandez's subpoena and inclusion as a "subject" of investigation, the Court found that because it was not clear, from the record, that Fernandez would be called as a defense witness, no error occurred. (Appendix 2, p.17) Finally, the Court determined that *Blakely* did not apply to the United States Sentencing Guidelines. (Appendix 2, p.21)

REASONS FOR GRANTING THE WRIT

1. The Petitioner is entitled to a new sentencing hearing based upon *United States v. Booker*

The Petitioner submits that his sentence should be vacated, as his sentence was enhanced under the United States Sentencing Guidelines on factors which were not determined by the jury, but were found by the court at sentencing. Further, as the sentencing court did not understand its discretion to treat the Guidelines as merely advisory, and because the Petitioner was given the lowest end of the applicable Guideline range, the Petitioner is entitled to a remand for determination of the sentencing court's discretion.

In the recent case of *United States v. Booker*, 543 U.S. ---- (2005), this Court determined that the United States Sentencing Guidelines, which required judges to impose a sentence within a particular range based upon findings made using a preponderance of the evidence standard at sentencing, were unconstitutional. The Court determined that "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt" *Id.* at ---

In the present case, at sentencing, the Petitioner's sentence was enhanced based upon judicial findings regarding the amount of narcotics involved in the offense, and based upon a finding that the Petitioner was a leader/organizer under U.S.S.G. § 3B1.1(c). The sentencing court imposed a sentence at the bottom of the calculated Guidelines range.

First, it is clear that the Petitioner is entitled to the benefits of the *Booker* decision. In Justice Breyer's opinion in *Booker*, it was explicitly held that *Booker* was available to all

cases that were not yet final. Further, Justice Breyer suggested in his opinion that, in cases where a *Booker* claim had not been previously raised, that a "plain error" analysis should be performed. 125 S.Ct. at 769

This Court has had the occasion to clarify the meaning of the plain error standard of review in the case of *United States v. Dominguez Benitez*. 542 U.S. 74 (2004) The Court defined the prejudice required for plain error reversal as "A defendant must thus satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is 'sufficient to undermine confidence in the outcome' of the proceeding." 542 U.S. at ---

Since the *Booker* decision, different circuits have treated the issue of application of plain error review inconsistently. For instance, the Sixth Circuit has determined that where a defendant's sentence is enhanced under the Sentencing Guidelines based upon judicial determinations made at sentencing, and not specifically supported by the jury's verdict, that the sentence constitutes plain error, and must be remanded. See *United States v. Alva*, 405 F.3d 383 (6th C. 2005) Further, the Sixth Circuit in *Alva* determined that, because the district court did not understand its ability to impose a sentence outside the Guidelines structure, that this required a remand, even though such violation was arguably not a Sixth Amendment violation.

The Eighth Circuit, by contrast, has taken a much more conservative approach. In *United States v. Dominguez-Chavez*, — F.3d ----, Case No. 04-2705 (8th C. 2005), the Court held that the defendant bore the burden to "establish a reasonable probability that, but for Booker error, the defendant would have received a more favorable sentence under an advisory guidelines regime." *Id.* at --- Unless the defendant can

therefore point to specific evidence in the record, in the Eighth Circuit, no resentencing will occur.

In the Eleventh Circuit, from which the Petitioner's case arises, an even more conservative approach than the Eighth Circuit. The Court has determined that where a defendant does not raise a *Booker* claim in his initial brief, that he has forfeited that claim for review. See, for example, *United States v. Silvestri*, — F.3d —, Case No. 03-12820 (11th C. 2005) In *Silvestri*, the defendant raised a *Booker* type claim in a supplemental authority immediately upon this Court's decision in that case. The Eleventh Circuit, however, completely refused to hear the claim, considering it forfeited error, based upon the failure to raise it in the initial brief.

Petitioner's case involves a situation where the underlying *Booker* issue was raised in the initial appellate brief. The Petitioner's appeal was originally decided, however, before *Booker*, and the Eleventh Circuit refused to apply the *Blakely/Apprendi* rationale to the Sentencing Guidelines. Although the Petitioner requested an en banc determination of his case, based on the *Booker* ruling, the Eleventh Circuit refused to address the merits of the claim.

The Petitioner asks that he be treated similarly to other cases in this Court, and that his case be remanded for further consideration in light of the *Booker* decision. See, for example, *Carlton v. United States*, --- U.S. ---, 73 U.S.L.W. 3648 (2005); *Garcia v. United States*, --- U.S. ---, 73 U.S.L.W. 3648 (2005); *Montgomery v. United States*, --- U.S. ---, 161 L. Ed. 2d 765 (2005); *West v. United States*, --- U.S. ---, 161 L. Ed. 2d 717 (2005)

2. The trial court erred in determining that evidence pertaining to voice spectrographic analysis was inadmissible

The Petitioner submits that the trial court's decision to exclude expert testimony on the issue of voice spectrographic analysis, and the Government's failure to utilize such evidence in the Petitioner's case, was reversible error.

Federal Rules of Evidence 702 governs the admissibility of expert testimony, and requires that a district court weigh the following factors in determining whether or not such evidence is admissible: "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles, and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." *McCorvey v. Baxter Healthcare*, 298 F.3d 1253,1256 (11th C. 2002) In determining these factors, the district court must consider "(1) whether the expert's theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential rate of error of the particular scientific technique; and (4) whether the technique is generally accepted in the scientific community." *Id.*

The Petitioner, at trial, proffered the testimony of Steve Cain. Mr. Cain is a member of the American Board of Recorded Evidence, and proposed testimony regarding voice spectrography, and the failure of the Government to use it in this case. The district court, and the court of appeals, determined that "voice spectrographic technique is not widely accepted by the scientific community and is thus not admissible under Daubert." (Appendix 2, p.15)

The Petitioner would submit that this conclusion is erroneous, as not only is this technique reliable, but it is accepted in the scientific community, including by the Government's own expert witness.

"Voice identification analysis consists of both 'critical listening,' which essentially requires an expert to carefully listen to the qualities of two voices, and spectrographic analysis. In the latter phase, a computer-based instrument compares the frequencies and amplitudes of a voice on a questioned recording with those of a known sample." *United States v. Drones*, 218 F.3d 496,499 (5th C. 2000)

In the case of *United States v. Smith*, 869 F.2d 348 (7th C. 1989), the Seventh Circuit held that the use of voice spectrographic analysis was admissible in a criminal proceeding. In that case, the Government sought to introduce evidence that a taped conversation was more than likely the voice of the defendant. The Government used voice spectrographic analysis to make its determination. Over objection by the defense that the evidence was contradictory and unscientifically sound. The Seventh Circuit noted that "we hold that the district judge did not abuse his discretion in admitting the testimony. Sufficient evidence of the reliability of this technique was adduced at trial. Moreover, this technique is not, under the proper circumstances, likely to mislead the jury. . . . The government presented ample evidence of the reliability of spectrographic voice identification at trial." *Id.* at 353 The Court therefore upheld admission of the evidence as reliable. It should be noted that the Government's expert providing the evidence for admission of the results in *Smith* was Dr. Nakasone, the Government expert in this case who argued that the method was unreliable.

Further, in the case of *United States v. Manning*, 583 F.2d 1194 (2nd C. 1978), the Second Circuit also concluded that the use of voice spectrograph analysis was proper in a criminal trial. The Court made a thorough analysis of the methodology used for this type of testing, including analyzing the reliability of the testing using four different factors: (1) acceptance within the scientific community, (2) potential rate of error, (3) existence and maintenance of standards, and (4) use of reliable techniques. The Court found that each of these factors warranted a finding that the use of spectrographic voice identification, and thus, admission of the expert testimony was appropriate. *Id.* at 1199

The Petitioner submits that the above cases provide solid examples of the reliability of such expert testimony. The district court and the Eleventh Circuit seem to have taken the evidence presented in the instant case in a vacuum: the Eleventh Circuit's decision ignores the findings, as outlined above, of its sister circuits. The Petitioner submits that he provided ample information for the court to find that such expert testimony was in fact reliable, and thus, certiorari should be granted on this issue.

3. The Government engaged in misconduct by intimidating a proposed defense witness into invoking his Fifth Amendment privilege

The Petitioner also submits that a writ of certiorari should issue on his claim that the Government, through its intimidation of a proposed witness, "chilled" that witness from testifying for the defense, and thus, deprived the Petitioner of his right to present witnesses.

The prosecutor is required to refrain from improper methods calculated to produce a wrongful conviction. *Gravely v. Mills*, 87 F.3d 779,789 (6th C. 1996)

"Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14,19 (1967) "To make a showing that the government has infringed on this right, the defendant must show that the government's conduct interfered substantially with a witness's free and unhampered choice to testify." *United States v. Thompson*, 130 F.3d 676,687 (5th C. 1997)(internal cite omit)

In the case of *United States v. Morrison*, 535 F.2d 223 (3rd C. 1976), the Third Circuit overturned the conviction of a defendant where the conduct by the prosecuting attorney caused a key defense witness not testify in the case. In *Morrison*, the defense announced its intention to call a certain witness who had been told by the United States that no federal charges were to be brought against her. After disclosure of the witness, the AUSA took several steps which ultimately led to the witness to invoke the Fifth Amendment protection. Specifically, the AUSA warned the witness, through defense counsel, of the ability of the witness to receive state or federal perjury charges. Further, before her testimony, the AUSA had the witness subpoenaed into his office, to discuss the ramifications of her testifying for the defense. The Third Circuit found that "Here, it was the influence of the Assistant United States Attorney, Mr. Villanova, a figure somewhat lower in the hierarchy than the trial judge but nonetheless the symbol of the Government's power to prosecute offenders. However good the trial judge found the intentions of Mr. Villanova, his bizarre conduct toward a witness for the defense is not to be condoned. It was without doubt responsible for the course pursued by Sally Bell in refusing to testify and to that extent deprived Mr. Boscia of due process of law under the Fourteenth Amendment." *Id.* at 228 The Court therefore ordered a new trial.

Further, in the case of *United States v. Vavages*, 151 F.3d 1185 (9th C. 1998), the actions of an AUSA in calling a defense witnesses attorney on three occasions, "reminding" the witness about the dangers of perjury, threatening to have that witness's agreement with the Government withdrawn, and articulating a specific belief that he believed the proposed testimony would be false (and thus subject to said perjury charges), amounted to improper witness intimidation, which deprived the defendant of his right to call witnesses on his own behalf. The Court held "We cannot condone the prosecutor's thinly veiled threats to prosecute Manuel for perjury and to withdraw her plea agreement in the event she testified in support of Vavages' alibi. As we have recognized in related contexts, it is imperative that prosecutors and other officials maintain a posture of strict neutrality when advising witnesses of their duties and rights. Their role as public servants and as protectors of the integrity of the judicial process permits nothing less." *Id.* at 1193 (internal cite omit) The Court therefore overturned the conviction on this basis.

A similar result must occur here. Prior to trial, the defense desired to call witness Fernandez to testify on his behalf. The defense averred that Fernandez's testimony would be exculpatory in nature. Prior to that time, Fernandez had been informed by the AUSA's office that he was not a target of any investigation. However, just prior to trial (and, therefore, Fernandez's testimony), he was issued a subpoena from the Government, and was also informed that he was now a "subject" of a criminal investigation. The Government issued Miranda warnings to Fernandez, indicating that Fernandez's statements could be used against him.
Not surprisingly, upon these threats, Mr. Fernandez decided against testifying for the defense, and indicated that he would be invoking his Fifth Amendment privilege if called.

The Petitioner submits that the Government's actions in this case were clearly improper, and led to the Petitioner not

calling a witness who could have assisted the defense. The Petitioner submits that certiorari should issue on this matter.

CONCLUSION

The Petitioner requests that this Court reverse the findings of the Court of Appeals and the district court, and remand for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 04-11678-BB

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

EDUARDO V. SAENZ,
Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

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Before: ANDERSON, BIRCH, and MARCUS, Circuit Judges.

PER CURIAM:

Per Petition (s) for rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate procedure; Eleventh Circuit Rule 35-5), the Petition (s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 04-11678
Non-Argument Calender

D.C. Docket No. 03-20587-CR-ASG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDUARDO V. SAENZ,

Defendant- Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(December 30, 2004)

Before ANDERSON, BIRCH and MARCUS, Circuit Judges.

PER CURIAM:

Eduardo V. Saenz appeals his convictions and sentence for conspiracy to possess with intent to distribute, distribution, and

possession with intent to distribute five kilograms or more of cocaine. We AFFIRM.

I. BACKGROUND

Saenz was charged with conspiracy to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841 (a)(1), 841 (b)(1)(A)(ii), and 846 (Count 1); distribution of five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841 (a)(1), 841 (b)(1)(A)(ii) and 18 U.S.C. §2 (Count 2); and possession with intent to distribute five kilograms of more of cocaine, in violation of 21 U.S.C. §§841 (a)(1), 841(b)(1)(ii) and 18 U.S.C. § 2 (Count 3). Saenz pled not guilty, and the case proceeded to trial.

A. The Government's Case Against Saenz

At Trial, the government relied primarily on the testimony of Ubano Perez, who testified to the following facts. In the spring of 2002, Joaquin Fernandez, an attorney and friend of Perez for ten years, introduced Perez to Saenz at a barbecue party at Fernandez's home. Fernandez introduced Saenz as "El Gordo" and suggested that Perez and Saenz might "get together in the future about some stuff." R3 at 54. Perez believed that Fernandez meant Saenz could supply cocaine to Perez. Later, Perez asked Saenz if he could possibly supply cocaine in the future. Saenz said "maybe." R3 at 56.

On 14 August 2002, Perez contacted "El Gordo" through Fernandez and obtained his pager number. Subsequently, Perez met "El Gordo" at a restaurant. "El Gordo" arrived in a small white car. At the restaurant, Perez asked "El Gordo" if he could provide 25 kilograms of cocaine for a customer. "El Gordo" said he could provide the cocaine. Another individual, Pablo Jorge, came to the restaurant, and "El Gordo" introduced him as the person who would deliver the cocaine to Perez's home. Perez and "El Gordo" exchanged cellular telephone numbers.

On 15 August 2002, Perez attempted to reach "El Gordo" on his

telephone and pager numbers in order to establish a delivery time for the cocaine. After several attempts, Perez reached "El Gordo." Perez recognized his voice from meeting "El Gordo" at the restaurant the previous day. Perez and "El Gordo" spoke briefly and established a delivery time.

At approximately 1:00 p.m., Jorge arrived at Perez's house in a pickup truck and delivered the cocaine. Around the same time, Perez saw "El Gordo" drive by his house in the same small, white car that he had driven to the restaurant. "El Gordo" waved to Perez, turned around in the cul-de-sac at the end of Perez's street, and left. Law enforcement officials who had instituted surveillance of Perez's house prior to the delivery arrested Perez.[1]

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[1] Authorities were able to institute surveillance of Perez's house and videotape the delivery because Perez's "customer," a government informant, had told them about the impending delivery.

The government introduced into evidence a videotape of the events leading up to Perez's arrest. Perez explained the events depicted on the videotape. The video showed a white Nissan Maxima driving past Perez's house after the delivery. Perez testified that FBI agents showed him the videotape immediately after he was arrested. Once shown the tape, Perez decided to cooperate with agents. Perez then testified that he told the agents that "El Gordo" had provided the cocaine and that "El Gordo" drove by in a white car as he received the cocaine. [2] Saenz did not object to this testimony.

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[2] Specifically, the prosecutor elicited the following testimony from Perez:

Q: Okay. And did you tell the FBI who the source of this cocaine was?

A: Yes, I did.

Q:Okay. What did you tell them?

A: I told them that it belonged to a friend of mine that I had just recently met, and told them that he was a guy who drove around in the front of the house and, you know, that's it.

Q:When you say that it belonged to a friend of yours that you had recently met, did you provide the FBI with his nickname?

A: Yes, I provided them with a nickname.

Q:Okay. And what was that nickname?

A: "El Gordo"

R3 at 101. The prosecutor further asked:

Q: What did you tell the FBI exactly?

A: I believe I told them he, you know, he just drove by the house, you know, when I received the merchandise.

Q: Okay. And did you tell him what kind of car he had driven by the house?

A: Yeah. I told him he was in a white car.

Id. At 103.

After Perez was arrested, Perez told the agents that "El Gordo's" pager number was on a piece of paper in his trunk. The government introduced the piece of paper as evidence. At the agent's request, Perez called "El Gordo" at 786-543-8522 to ask for more cocaine. The agents recorded Perez's calls to "El Gordo." The government played the audiotapes of their conversations for the jury. Perez testified that he recognized "El Gordo's" voice on the tapes as that of Saenz. Jorge delivered the additional cocaine in the same white truck, but Perez did not see the white Maxima again.

Pursuant to a plea agreement, Perez pled guilty to selling cocaine and agreed to cooperate with the government in return for a reduction of his sentence. On cross-examination, Saenz's attorney questioned Perez about cooperating with the government in exchange for a reduction in his sentence. Although Perez had testified on direct that he believed he would not be entitled to additional reduction in his sentence based on his testimony, Perez stated on cross that he hoped to get a further reduction in sentence after th trial.

Other government witnesses provided evidence corroborating Perez's testimony and linking "El Gordo" to Saenz. Based on telephone records shown to he by the government, Joelyn Losada, Saenz's former girlfriend, testified that she had made some calls to and received calls from cellular telephone number 786-543-8522 and pager number 786-543-8522 during a time period that she was in contact with Saenz. However, she testified that she did not know Saenz as "El Gordo".

Government witnesses Leonard Niemes, a sales consultant at Bill Seidle's Nissan, testified that Arlett Saenz, Saenz's wife, traded in a white 2001 Nissan Maxima for a minivan on 24 September 2002. FBI Agent Caeser Paz testified that he had conducted surveillance of the second cocaine delivery and had arrested Rodolfo Rodriguez, the driver of a black Lexus apparently conducting "counter surveillance" of the delivery. R4 at 76. The FBI recovered two cellular phones, among other things,

from Rodriguez's person and vehicle. Agent Michael C. Gualtieri, who also conducted surveillance of the second delivery, testified that he had arrested Jorge. The FBI recovered two cellular phones and a wallet from Jorge.

Agent Roberto Diaz, who arrested Perez, testified that Perez agreed to aid law enforcement by calling "El Gordo" at 305-501-9531 and 786-543-8522 to request more cocaine. "El Gordo" agreed to provide more cocaine that afternoon. After agents arrested Rodriguez and Jorge, the agents had Perez call "El Gordo" and say that his delivery people had not arrived. After Perez and "El Gordo" hung up, one of Rodriguez's cellular telephones received a call. Additionally, Diaz testified that he found an address book with a page that said, "Gordo' 501-9531, beeper, in Jorge's belongings and a handwritten note with directions to Saenz's house in Rodriguez's belongings.

According to Agent Diaz, pager number 305-501-9531 was subscribed to by an Alexander Gonzalez at a nonexistent address and a cellular phone number 786-543-8522 was subscribed to by Jose Gutierrez Customary with a birth date but no other information. An analysis of telephone records revealed that: (1) on 13 August 2002, a phone number associated with attorney Fernandez exchanged calls with "El Gordo's" pager and cellular numbers; (2) on 14 August 2002, several calls were exchanged between "El Gordo's" numbers, a number associated with Losada (Saenz's girlfriend), and a number associated with Perez; (3) on 15 August 2002, a number associated with Perez exchanged calls with "El Gordo's" pager number, and "El Gordo's" number exchanged call with three numbers associated with Fernandez following the arrests of Perez, Jorge, and Rodriguez; and (4) on 16 and 17 August 2002, a phone number associated with Arlett Saenz made several calls to a number associated with Fernandez, and Fernandez's number returned a call to Arlett Saenz's number.

B. Fernandez's Invocation of Fifth Amendment Rights

At trial, the district court conducted a hearing outside of

the jury's presence to determine whether attorney Fernandez, who was on the government's witness list, would invoke his Fifth Amendment right against self-incrimination if called to testify. Statements by the prosecutor, attorney Fernandez, and Saenz's attorney revealed the following facts.

On 10 October 2002, an FBI agent interviewed attorney Fernandez. According to Fernandez, the agent assured him that he "wasn't a target" of any investigation. R3 at 113. Fernandez answered various questions about his relationship with Saenz, but he did not confirm or deny that he had introduced Saenz and Perez.

On the Friday before trial, the government issued Fernandez a trial subpoena. Over the weekend prior to the trial, the government faxed a letter to Fernandez, at his home, which advised Fernandez that he was the subject of a criminal investigation and gave him Miranda warnings. [3]

During the hearing, the prosecutor stated that he planned to ask Fernandez questions aimed at "corroborat[ing] the existence of a relationship between him and Mr. Saenz" R3 at 106. In particular, he intended to focus on facts Fernandez revealed in the 10 October interview, including that he had know Saenz for approximately 12 years, that he had previously provided legal representation to Saenz, that he spoke at Saenz almost daily and had lunch with him approximately three time per week, and that he knew of personal problems Saenz had experienced with his daughter. The prosecutor also intended to ask Fernandez whether he had introduced Perez and Saenz and whether he was called by both Perez and Saenz after they were arrested.

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[3] The letter was not made a part of the record.

Additionally, the prosecutor stated that he would ask Fernandez whether he was using his regular cell phone number during the time period, whether he was out of town when Perez was arrested and unreachable on his cell phone, whether he told Perez that he could not represent him because of the conflict of interest based on their friendship, and whether, after talking to Agent Diaz about Perez's potential cooperation with the government, he told Perez to "Do what you've gotta do." Id. at 108.

Saenz's attorney stated that he believed Fernandez would, on cross, "deny the introduction or any introduction at any time between Mr. Saenz and Mr. Urbano Perez" id. at 110, not be able to identify the pager number cited by the prosecutor, and "deny that there was ever an agreement or understanding between him and anybody else to put together this drug deal or any other drug deal," id. at 109-10. Saenz's attorney also stated that Fernandez would testify that he was unavailable to take Perez's case because he was out of the district or country, not because of a conflict of interest, and that he called Assistant U.S. Attorney Tony Gonzalez to verify that if Perez cooperated with the FBI agents and called "El Gordo" for a second delivery, he would qualify for a sentence reduction.

Fernandez stated theat the FBI agent indicated that he was not a target before the 10 October meeting, and, after he spoke to the agent, he received a call from an Assistant U.S. Attorney, who asked Fernandez to meet him for an interview because he had already spoken with the agent. Fernandez stated that he believed the letter contradicted these earlier assertions by the government. Fernandez indicated that he interpreted the letter as follows:

[T]he first sentence kind of tells me, after being around here for 30 years, that because you don't want to talk to me, then I'm going to send you this [target] letter...[F]ollowed by the next sentence of the other paragraph, if any information that you give us we have information that it's going to incriminate you, totally contrary to any conversation that I had with Agent Diaz and totally contrary to any conversation I had with this Assistant

[Unites States Attorney].

Had they prefaced their telephone conversations and their visit with those two sentences, I would have thrown them out of the office and I would have hung up on them.

So, I'm angry. I think that I have been misled...I don't trust them, and I don't trust anything they say, and I don't trust any question they are gonna ask.

And in this letter, it is obvious that they don't want me to testify for either side, and I won't, and I'll be crazy to come in here and even answer that I'm an attorney because that's the gravamen of-if I'm an attorney and I represent these two people and I put them together to do a drug deal, guess what?

I will take the fifth, even to the fact that I am an attorney and that I've ever represented anybody for anything at any time.

After Fernandez said that he would invoke his Fifth Amendment rights, the prosecutor state that he wold not call him as a witness.

C. The Admission of Expert Testimony on Voice Spectrographic Analysis

Saenz sought to introduce testimony from expert witness Steven Cain on voice print analysis, a process used to determine wether voice samples were produced by the same individual. Saenz indicated that Cain would testify about the origin and history of the technique, its precision or accuracy, the methods used to conduct it, and "[t]he time, expense and availability of voice print analysis to law enforcement and the ability to force a suspect to provide a voice sample by court order without offending his/her right to remain silent." R1-34 at 1. Cain had not conducted any voice print analysis in the case. The government filed a motion in limine to exclude Cain's proposed testimony. The district court held an evidentiary hearing to rule on the motion.

At the hearing, Cain testified that a committee called the American Board of Recorded Evidence ("ABRE"), made up of approximately fifteen people from the private sector, promulgates

standards governing voice identification. Cain could identify no relevant scientific community involved in voice spectrography. Cain testified that the FBI used voice identification analysis in its investigations but did not certify the method for use in court. The government's expert, Dr. Hirotaka Nakasone, a speech scientist and an electronics engineer with the FBI, testified that he did not believe that ABRE was a scientific organization. He further testified that the technique was not sufficiently reliable to be offered by the FBI for use in court.

Reasoning that Saenz had to establish the reliability of voice spectrography in order to introduce testimony on the government's failure to use it, the district court applied factors enumerated in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592-94, 113 S. Ct. 2786, 2796-2797 (1993), to determine that voice spectrography is unreliable. The court excluded Cain's testimony but indicated that it would permit Saenz to draw an inference from the fact that the government had not provided the jury with a voice exemplar of Saenz's voice for comparison with the tapes of "El Gordo." Consistent with the parties' stipulations, the court instructed the jury following the trial:

> In a criminal case, the Government can require a defendant to provide a sample of his voice in the presence of its agents, preserve the sample and then introduce it at trial for consideration by the jury. A defendant may also provide a sample of his voice for consideration by the jury.

R5 at 185. In its opening statement and closing argument, Saenz's attorney emphasized that the government could have provided a voice exemplar of Saenz's voice so that the jury could compare it would the voice of "El Gordo," but did not do so.

D. Verdict and Sentencing

The jury found Saenz guilty on all counts. In the Presentence Investigation Report, the probation officer set Saenz's base offense level at 34 and his criminal history category

at I. The probation officer identified Saenz as "an organizer, leader, manager, or supervisor" in the offense and recommended a two-level "role" enhancement pursuant to U.S.S.G. § 3B1.1©). Saenz objected to the factual bases of the enhancement. At the sentencing hearing, the district court found by a preponderance of the evidence that Saenz had acted as a supervisor, organizer, and leader in committing the offense and imposed the two-level role enhancement. Saenz did not object to the use of judicially found facts to enhance his sentence.

II. DISCUSSION

A. Admissibility of Expert Testimony

On appeal, Saenz first argues that the district court abused its discretion in excluding, pursuant to Federal Rule of Evidence 702, Cain's Expert testimony on voice spectrographic analysis. Saenz argues that the district court erroneously concluded that Cain's testimony regarding voice spectrographic analysis failed to meet the Daubert standard for reliability.[4]

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[4] Saenz also argues that the court erred in applying Daubert in the first place because he did not seek to introduce a specific test result, but rather intended to show that FBI had failed to employ a regular investigate technique, voice spectrographic analysis, to verify that Saenz's voice matched that of "El Gordo." However, Rule 702 requires that the district court determine whether all expert testimony is reliable, not just that regarding a particular scientific rest result. Kumho Tire Co., V. Carmichael, 526 U.S. 137, 147, 119 S. Ct. 1167, 1174 (1999). In making this determination, the district court exercises considerable latitude, and it "should consider the specific factors identified in Daubert where they are reasonable measures of the reliability of expert testimony." Kumho Tire Co., 526 U.S. at 152, 119 S. Ct. At 1176. Here, where Cain would testify about the existence acceptance of the technique by the scientific community is a reasonable measure of its reliability.

We review evidentiary rulings for abuse of discretion, and we reverse only if an erroneous ruling "resulted in a substantial prejudicial effect." United States v. Samaniego, 345 F.3d 1280, 1282 (11th Cir. 2003). Rule 702, which governs the admission of expert testimony, provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert...may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or date, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Federal Rule of Evidence 702. To determine whether to admit expert testimony, we analyze the expert's qualifications, the reliability of his methodology, and the assistance his testimony will likely provide to the trier of fact to understand the evidence. Quiet Technology DC-8, Inc. v. Hurel-Dubois Ltd., 326 F.3d 1333, 1340-41. To evaluate the reliability of an expert's scientific opinion under Daubert, we consider, inter alia, "(1) whether the expert's theory can and has been tested; (2) whether the theory had been subjected to peer review and publication; (3) the known or potential rate of error of the particular scientific community." Id. At 1341. No circuit courts have addresses th admissibility of voice spectrography testimony since Daubert, see United States v. Drones, 218 F. 3d 496, 503-04 (5th Cir. 2000), and at least one district court has concluded that the technique is unreliable, see united States v. Angleton, 269 F. Supp. 2d 892-902 (S.D. Tex 2003).

Based on the testimony presented by Cain and the government's expert Nakasone, the district court did not err in concluding that the voice spectrographic technique is not widely accepted by the scientific community and is thus not admissible

under Daubert. Moreover, id the district court did commit error, its exclusion of Cain's testimony did not create a substantial prejudicial effect against Saenz. In his opening argument and closing statement, Saenz's attorney noted that the government could have compelled Saenz to provide a voice exemplar but did not do so. Additionally, the court charged the jury that the government or Saenz could have provided a voice exemplar.

B. Deprivation of Witness Testimony

Second, Saenz argues that the government's subpoena and letter to Fernandez constituted a "threat that id he testified for Saenz, his borderline status in the eyes of the government could well escalated him [from subject of an investigation] to 'target.'" Initial Brief of Appellant at 36. Saenz argues that the government never intended to call Fernandez as a witness but included him on its witness list only to force Fernandez to invoke his Fifth amendment rights. Saenz argues that these actions violated his Fifth and Sixth Amendment rights to call witnesses in his defense to testify without interference from the prosecution.

Because Saenz raises this objection for the first time on appeal, we review for plain error. See United States v. Duncan, 381 F.3d 1070, 1073 (11th Cir. 2004). We have the discretion to correct a plain error only where (1) there was error; (2) the error was plain or obvious; (3) error affected substantial rights; and (4) "the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." Id. At 1073-74. "Substantial government interference with a defense witness' free and unhampered choice to testify" deprives the defendant of due process of law and violated his Sixth Amendment right to Compulsory Process. United States v. Terzado-Madruga, 897 F.2d 1099, 1108 (11th Cir. 1990)(citations omitted).

Here, Fernandez was not a defense witness. Saenz never places Fernandez on its witness list, and Saenz never indicated that he planned to do so. Other than the statements of Saenz's attorney about what he believed he could elicit from Fernandez

during his cross-examination, we have no evidence that Fernandez's testimony would be favorable to Saenz. Further, we have no evidence to support Saenz's claim that the government placed Fernandez on its witness list with no intent to ever call him as a witness. To the contrary, the prosecutor indicated that he planned to use Fernandez's testimony to support the government's case, i.e., to corroborate a relationship between Fernandez and Saenz. In light of these circumstances, we find no error.

C. Admission of Hearsay Testimony

On direct examination, Perez testified that he had received the cocaine from "El Gordo," the defendant, and that the defendant had driven down Perez's street and past Perez's home at the time of the drug deal. Perez the testified that after he had received the cocaine form "a friend of mine that [he] had just recently met..., the guy who drove around in front of the house," and that his friends nickname was "El Gordo." R3 at 99. Perez next argues that this testimony is hearsay, because the conversation with the FBI occurred after he had agreed to cooperate and cannot be used to rebut a charge of improper influence or motive, and that district court committed plain error by admitting the testimony because it affected his substantial rights.

Because Saenz did not object to the admission of Perez's testimony during trial, we again review for plain error. See Duncan, 381 F.3d at 1073. Federal Rule of Evidence 801 (d)(1) permits a witness to testify as to his own prior statement if he is subject to cross examination on the statement, and the statement is

(A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of a recent fabrication or improper influence or motive, or ©) one of identification of a

person made after perceiving the person."

Federal Rule of Evidence 801 (d)(1). Under Part B of the Rule, prior consistent statements can be admitted to rebut a charge of improper influence or motive only if statements were made prior to the creation of the influence or motive. Tome v. United States, 513 U.S. 150, 167, 115 S. Ct. 696, 705 (1995).

Assuming, as Saenz argues, that Perez's testimony about his statements to the FBI agents constituted inadmissible hearsay, see United States v. Paradies, 98 F.3d 1266, 1290 (11th Cir. 1996) (Holding that testimony did not qualify as nonhearsay under Rule 801 (d)(1)(B) because it was made after the witness had agreed to cooperate with the government), and that this error was plain, see Duncan, 381 F.3d at 1074 (an error is plain "if it is obvious or clear under current law" (Citations omitted)), we cannot reverse the district court's decision unless the error affected Saenz's substantial rights, see id. At 1073-1074. To determine whether the error affected his substantial rights, we weigh, in light of the whole record, the prejudice created by the admission of the evidence against the evidence of the Saenz's guilt. See United States v. Hands, 184 F.3d 1322, 1329 (11th Cir. 1999).

Saenz argues that the government's case "rested almost entirely on Perez's credibility," and that the government could not have convinced the jury that Perez was credible without his testimony about his prior consistent statements to the FBI. However, the record shows that the government introduced other circumstantial evidence which independently corroborated Perez's testimony. First, the government presented a videotape of the events leading up to Perez' arrest which corroborated Perez's testimony about the events of the day. Second, government witness Leonard Niemes indicated that Saenz's wife owned a white Maxima resembling the white Maxima in the videotape, and that after Perez's arrest, Saenz's wife traded in the car. Third, agent Robert Diaz, testified that, at the time of his arrest, Rodriguez has a hand written note with directions to Saenz's house in his car. Fourth, the government showed a summary of

telephone phone records which intended to establish that Saenz was "El Gordo." This evidence, which independently corroborated Perez's testimony, distinguishes this case from those in which we have held the admission of hearsay testimony to constitute reversible error. See, e.g. Hands, 184 F.3d at 1330-34 (holding that improper admission of evidence was not harmless where the government's case rested primarily on the testimony of biased witnesses without independent corroborating evidence and the highly prejudicial effect of the evidence was exacerbated by the prosecutor's improper comments). Because the evidence of Saenz's guilt outweighs any prejudice created by the introduction of Perez's hearsay testimony, the admission of the hearsay testimony did not affect Saenz's substantial rights, and we will not correct that error.

D. Sentencing Enhancement

Fourth, Saenz relies on Blakely v. Washington, 124 S. Ct. 2531 (2004), to argue that the district court committed plain error in relying on judicially found facts to impose a two-level role enhancement under U.S.S.G. §3B1.1. Since the sentencing hearing, we have held that Blakely does not impact the application of the Sentencing Guidelines in our court. United States v. Reese, 382 F.3d 1308, 1312 (11th Cir. 2004). Further, at the time sentencing, it could not have been obvious that Blakely "would apply to render unconstitutional judicial fact finding leading to sentence enhancement under the Federal Sentencing Guidelines." Duncan, 381 F.3d at 1074. As such, the district court did not commit plain error.

III. CONCLUSION

We conclude that the district court did not abuse its discretion in excluding Cain's expert testimony under Federal Rule of Evidence 702, or commit plain error in allowing government witness Fernandez to invoke his Fifth amendment rights, admitting Perez's hearsay testimony about his prior consistent testimony to FBI agents, or relying on judicially found facts to enhance Saenz's sentence. Thus, we **AFFIRM** the district court's ruling.

Supreme Court, U.S.
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No. 04-1610

In the Supreme Court of the United States

EDUARDO V. SAENZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

Petitioner contends that his sentence under the federal Sentencing Guidelines was imposed in violation of the rule announced in *United States* v. *Booker* and *United States* v. *Fanfan*, 125 S. Ct. 738 (2005). In *Booker* and *Fanfan*, this Court held that the Sixth Amendment, as construed in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), applies to the federal Sentencing Guidelines. *Booker*, 125 S. Ct. at 748-756 (Stevens, J., for the Court). In answering the remedial question in those cases, the Court then applied severability analysis and held that the Guidelines are advisory rather than mandatory, and that federal sentences are reviewable for reasonableness. *Booker*, 125 S. Ct. at 757-769 (Breyer, J., for the Court). Accordingly, the appropriate disposition is to grant certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of *Booker* and *Fanfan*. The court of appeals can then decide what effect, if any, those

decisions have on petitioner's sentence, taking into account any applicable doctrines of waiver, forfeiture, and harmless error.* See *id.* at 769.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

JUNE 2005

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* The government waives any further response to the petition unless the Court requests otherwise.